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No. 93-1926

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NATIONAL RIFLE ASSOCIATION

Petitioner,

vs.

HANDGUN CONTROL FEDERATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

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August 4, 1994

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QUESTIONS PRESENTED

1. Whether Respondents' use of Petitioner's list of the Ohio House of Representatives, organized by district number and listing the Representatives' name, district number, home town, and Columbus and district office phone numbers, constitutes a "fair use" in accordance with 17 U.S.C. §107?

2. Whether Respondents are entitled to a presumption of a "fair use" where the use was not for commercial or profit-making purposes for purposes of analysis under 17 U.S.C. §107(4)?

3. Whether there is a split of authority between the Sixth Circuit and the Second and Fifth Circuits regarding the application of the "fair use" doctrine under 17 U.S.C. §107?

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To the United States Court of Appeals For the Sixth Circuit

STATEMENT OF THE CASE

Respondents Handgun Control Federation and Susan Axelrod (collectively "HCF") essentially agree with the statement of the case of Petitioner National Rifle Association

("NRA").[1] The facts are not in dispute. The District Court properly decided the case on summary judgment. However, the Court should note that the District Court held that NRA's list was not an original compilation entitled to copyright protection, in addition to finding that HCF's use was a fair use under 17 U.S.C. §107. The Sixth Circuit chose only to address the fair use issue and did not address the issue of the lack of originality of NRA's list of state legislators.

ARGUMENT

I. NRA Misstates And Misinterprets The Application Of The Fair Use Doctrine In Campbell v. Acuff-Rose Music, Inc.

A. The "Fair Use" Doctrine.

Fair use is a privilege in other than the owner of a copyright to use copyrighted material in a reasonable manner

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[1] HCF disagrees with NRA's characterization of its list of the members of the Ohio House of Representatives as being "in a unique format devised by NRA." (Petition, at 3.)

HCF further disagrees with NRA's description of HCF. HCF is a nonprofit organization engaged in educational and lobbying activities concerning legislation regarding gun sales, ownership, and transfer.

without the owner's consent, notwithstanding the monopoly granted to the owner. Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981). The doctrine was designed primarily to balance the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979).

Section 107 of the Copyright Act describes unauthorized and unlicensed uses of copyrighted material that are not infringements of copyright:

> ... the fair use of a copyrighted work, **including such use by reproduction in copies** ..., for purposes such as criticism, comment, ..., teaching, ..., scholarship, or research, **is not an infringement of copyright**. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the

> copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107 (1990) (emphasis added).

Where fair use is asserted, the Court should weigh the four factors recited in 17 U.S.C. §107 and apply an "equitable rule of reason" analysis to particular claims of infringement. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574, 597-98 (1984). Applying this standard, both the District Court and the Sixth Circuit found that all four fair use factors [§§107(1) through (4)] weighed heavily, if not entirely, in favor of HCF.

NRA does not seriously challenge the Sixth Circuit's fair use analysis under the first three factors listed in 17 U.S.C. §107. As this Court cautioned in Campbell v. Acuff-Rose Music, Inc., 510 U.S. ____, 114 S.Ct. 1164, 1170-71, 127 L.Ed.2d 500, 515 (1994):

> Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Furthermore, as the Sixth Circuit correctly noted, the weighing in this case must take into consideration the use made of the list by HCF--the exercise of its "First Amendment speech rights to comment on public issues and to petition the government regarding legislation." National Rifle Ass'n v. Handgun Control Federation, 15 F.3d 559, 562 (6th Cir. 1994). "The scope of the fair use is broader when the use relates to issues of public concern." Id.

B. HCF's Noncommercial, Nonprofit Use Of NRA's List Is Entitled To A Presumption Of Fairness.

In its first argument, NRA claims that the Sixth Circuit misapplied this Court's interpretation of the fourth factor of the "fair use" defense set forth in 17 U.S.C. §107 relating to "the effect of the use upon the potential market for or value of the copyrighted work." NRA argues that this Court, in Campbell v. Acuff-Rose Music, Inc., eliminated the presumption of fair use for that factor accorded a noncommercial, nonprofit use by Sony, 464 U.S. at 451, so that the Sixth Circuit's reliance on the presumption in favor of HCF was in error. NRA, however, totally distorts the meaning

of the Campbell decision and its impact on the presumption discussed in Sony.

The Sony case involved the video tape recording of broadcast television programs by home users primarily for the purpose of "time-shifting," or watching programs at a time other than when originally offered for viewing. The owners of copyrights in these programs sued the manufacturers of the home video tape recorders ("VTR") for infringement of the copyrights by the VTR users using the manufacturer's equipment. The Court held that the unauthorized copying of entire copyrighted programs was not an infringement of such copyrights where the use was for time-shifting only and not to otherwise sell or profit from the recording. In so holding, the Court stated that such a noncommercial, nonprofit activity was presumptively a fair use of the copyrighted material:

> If the [VTR] were used to make copies for a commercial or profitmaking purpose, such use would presumptively be unfair. **The contrary presumption is appropriate here**, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a **noncommercial, nonprofit activity**.

464 U.S. at 449 (emphasis added).

Thus, where an unauthorized use of a copyrighted work is for a noncommercial, nonprofit purpose, it presumptively does not have a harmful effect on the potential market for or value of the copyrighted work.

The Sixth Circuit is not alone in having interpreted Sony as providing a presumption in favor of a fair use where the use was for a noncommercial, nonprofit purpose. Lewis Galoob Toys, Inc. v. Nintendo, Inc., 964 F.2d 965, 971, (9th Cir. 1992), cert denied. 113 S.Ct. 1582, 123 L.Ed.2d 149 (1993).

NRA cites the Court's recent Campbell opinion in an attempt to manufacture error on the part of the Sixth Circuit in the instant case. Specifically, NRA quoted the following passage from Campbell:

> No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony's discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming).

(Petition at 8 quoting Campbell, 1145. S.Ct. at 1177, 127 L.Ed.2d at 523.)

NRA contends that this passage eliminates any presumption in favor of fair use for a noncommercial purpose; there remains only a presumption against fair use where the original is copied in its entirety for commercial purposes. NRA then states that "the instant case does not involve 'mere duplication for commercial purposes,' [because] as the Sixth Circuit itself recognized: 'HCF's use of the NRA legislator list was noncommercial.'" (Petition at 8.) Therefore, under NRA's analysis, no presumption would apply. This is erroneous.

Campbell involved a rap group's parody of the pop song "Oh, Pretty Woman." Parodies, by definition, are unique and distinct from the use at issue in the instant case. When the Court stated that no presumption of market harm based on Sony was applicable to Campbell, it meant that there should not be a presumption of market harm because the market for a parody is generally different from the market for the original work. 114 S.Ct. 1177-78, 127 L.Ed. at 523. In other words, while the parody may be for commercial purposes, it is possible that the market for the parody work (a rap song) would have little or no effect on the market for the original

work (a pop song). Id. However, where the use involves the duplication of the original work, the market for the duplicate work is the same as the market for the original, and therefore the presumptions set forth in Sony apply (i.e. that a commercial use of duplicate work presumptively is unfair to the copyright owner, because of the unlikelihood of affecting the market for the original, and the noncommercial and nonprofit use of a duplicate work is presumptively fair).

Quoting from the remainder of the paragraph from which NRA took the above passage from Campbell, it becomes clear why NRA's analysis is flawed. The paragraph goes on to state that:

> ... [W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects," (citation omitted), of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. (Citation omitted). But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.... (Citation omitted). This is so because the parody and the original usually serve different market functions.

Campbell, 114 S.Ct. at 1177-78, 127 L.Ed.2d at 523.

Thus, Campbell is limited in scope to the analysis of market harm with regard to parodies. The error made by the Sixth Circuit in Campbell, as identified by this Court, was that it failed to recognize the market distinction between a parody and a duplicate work. Such a distinction does not exist in the instant case regarding HCF's use of the list of Ohio General Assembly Representatives.

Since the instant case involves a duplication of the original work, the Sony analysis and presumption in favor of a fair use apply. Accordingly, because HCF's use was a noncommercial, nonprofit use, such use is entitled to a presumption of fairness.

Moreover, because the instant case involves a noncommercial use of the list, the burden is on NRA to rebut the presumption of fairness by proving that HCF's noncommercial use was harmful to the potential market for the list. 17 U.S.C. §107(4). This Court, in Sony, set forth its analysis of the burden of proof as follows:

> ... [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. **A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.**
>
> * * *
>
> What is necessary is a showing by a preponderance of the evidence that **some** meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. **But if it is for a noncommercial purpose, the likelihood must be demonstrated.**

Sony, 464 U.S. at 451 (emphasis original and added).

A presumption of unfair use does not arise here since the use of the list had no commercial purpose. Therefore, it is NRA who has the burden of demonstrating some meaningful likelihood of harm resulting from the use. NRA has set forth no facts upon which this Court could conclude that the use was, or may be, harmful. Indeed, NRA has previously acknowledged it sustained no monetary loss of any kind. NRA only argues that HCF's use of the list allowed HCF to more effectively counter NRA's lobbying efforts. (Petition at 9 n.

8.) Such a statement totally ignores the inquiry required by the fourth factor -- harm to the potential market for or value of the work.

Regardless of whether or not any presumption applies to the analysis under the fourth fair use factor, HCF's use of the list did not usurp the demand for or adversely effect the value of the list. Both the District Court and Sixth Circuit correctly found that, if anything, the existence of HCF and its publication of materials that directly opposes the position taken by NRA, increases the demand for NRA materials. If no organization publicly opposed NRA's position, there would be little need for NRA to publicly communicate its views via newsletter, or for NRA's lobbying of the Ohio General Assembly.

Further, as both the District Court and Sixth Circuit noted, HCF's distribution of the list was limited to its 200 members. This limited distribution did not adversely effect the demand for the list among the NRA's members or decrease the value of the list to them. The lower courts correctly resolved the fourth factor in favor of HCF.

II. There Is No Split Of Authority Between the Sixth Circuit and the Second and Fifth Circuits Regarding the Application of the "Fair Use" Doctrine Under 17 U.S.C. §107.

A. Respondents Are Not Barred From Invoking The Fair Use Defense.

NRA seeks to manufacture a split of authority between the Second, Fifth, and Sixth Circuit Courts of Appeal concerning the issue of whether a copier of an original work, who fails to credit the original's author, is entitled to invoke the fair use defense. This argument has no basis in the undisputed facts of this case, and should be disregarded.

NRA argues that Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980), and Weissman v. Freeman, 868 F.2d 1313 (2d Cir. 1989), conflict with the Sixth Circuit's opinion in the instant case. Specifically, NRA claims that Triangle and Weissman stand for the proposition that the fair use defense should be available where the defendant fails to credit the author of the original work.

Contrary to NRA's assertion, the decisions of the Second and Fifth Circuits do not establish a per se rule that the

fair use defense is not available where the party evoking the defense fails to credit the author.

In Weissman, the plaintiff was a former research assistant to the defendant, plaintiff's mentor. Plaintiff and defendant co-authored numerous papers focusing on various aspects of nuclear medicine. Thereafter, plaintiff, on his own, prepared an article on a similar topic, and utilized portions of previous papers jointly written by the parties (which the Court considered a copyrightable derivative work). The dispute arose when the defendant used the derivative work prepared by the plaintiff to give a review course in nuclear medicine. The defendant deleted the plaintiff's name from the work, substituted his own name, and slightly changed the title of the article. Id. at 1316.

The Court stated that in examining the equitable considerations, it could not ignore the defendant's attempt to pass off the work as his own, citing the substitution of the author's name and slight change to the title of the work prior to distributing the work as conduct undermining the defendant's right to assert the fair use defense. Id. at 1324.

However, nowhere in the opinion does the Court state that such conduct bars the right to claim the fair use defense.

The Triangle opinion barely mentioned the "passing off" issue, as that case involved no such conduct.

Thus, neither the Second nor the Fifth Circuits set forth a per se rule against claiming the fair use defense where the defendant in a suit for infringement neglects to credit the author of the work. Once again, the Courts look to equities of the situation, and evaluate each case on its own facts.

The facts of this case do not warrant depriving HCF of the fair use defense. NRA filed for copyright protection of the two newsletters on July 27, 1989, **after** it learned of the HCF mailing. NRA did not consider seeking copyright registration for the newsletters prior to seeing the HCF mailing, nor was copyright protection sought for any of its newsletters other than these mailings to its Ohio members. There was no notice of copyright anywhere on the list, nor was there any indication of exclusive ownership of the lists by the NRA. There was nothing on the list stating that the list should not be copied. Respondent Axelrod was unaware that NRA had generated the

list rather than copying it from similar lists available in the public domain.

NRA does not dispute these facts. It simply makes the conclusory statement that "HCF had 'passed off' or 'palmed off' NRA's list as the product as [sic] their own efforts." (Petition at 12.) There is no evidence that HCF attempted to pass the NRA list off as its own. There was no indicia of NRA ownership on the list which could have been deleted, and HCF did not add its name to the list itself prior to mailing its newsletter to its small contingent of members. Accordingly, this case does not involve "passing" or "palming" off.

B. The Sixth Circuit's Analysis Under The Second Fair Use Factor Is Not In Conflict With the Second Circuit.

NRA argues that the Sixth Circuit's opinion finding in favor of HCF concerning the second fair use factor -- the nature of the work -- conflicts with the Second Circuit in Weissman, supra. The Court in Weissman stated, in very general terms, that although a work may be almost entirely factual, and the work may not be directly related to financial gain, copyright protection may be granted to encourage authors

and researchers to continue their efforts and advance the public interest. Id. at 1325.

The work at issue in Weissman was an article involving nuclear medicine education authored by a physician. The Court found that the alleged infringer of the work, considered a copyrightable derivative work based on earlier works co-authored by plaintiff and defendant, could gain professionally (and eventually monetarily) from the distribution of the work in his name, even if he did not realize immediate direct monetary gain. Id. at 1325. The authors of the NRA list could realize no such professional, and eventually monetary, gain.

Success or failure for NRA in the legislative lobbying arena is not based in any way dependent upon copyright protection for a list of the Ohio House of Representatives. As the Sixth Circuit noted, lists containing similar factual information are readily available. 15 F.3d at 562. Thus, the facts in the instant case are not analogous to the facts of Weissman. Accordingly, the decision of the Second Circuit in Weissman is not inconsistent with the approach of the Sixth Circuit in this case whereby the fair use defense is to be

evaluated on a case-by-case basis weighing the four nonexclusive factors set forth in the Copyright Statute. See, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985).

The nature of NRA's "work" is a factual compilation. The constituent elements of the list (name, district number, hometown, and office phone numbers) are all uncopyrightable facts. Since copyright protection for compilations of factual material is at odds with the basic thrust of the copyright laws (Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1370 (5th Cir. 1981)), the scope of permissible fair use is greater than would be possible with respect to "work that is truly creative." Dow Jones & Co. v. Board of Trade of City of Chicago, 546 F.Supp. 120, 131 (S.D.N.Y. 1982); see also Harper & Row, 471 U.S. at 547 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy"); New York Times Co. v. Roxbury Data Interface Inc., 434 F.Supp. 217, 221 (D.N.J. 1977) (where the work is a work more of diligence than of originality or inventiveness, defendants have greater license to use

portions of the work than they would have if a creative work were involved).

Additionally, the scope of the doctrine is undoubtedly wider when the message conveyed relates to matters of high public concern. Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983); see also Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966). The NRA's list was used to facilitate contact between members of the Ohio House of Representatives and their constituents regarding proposed legislation and the public's "right to petition the Government for a redress of grievances." U.S. Const. amend. I. While the First Amendment does not provide a privilege to use copyrighted material distinct from the fair use doctrine, where vital First Amendment concerns are implicated, the breadth of the fair use doctrine expands and accords greater protection to what otherwise might constitute an infringement. Wojnarowicz v. American Family Ass'n, 745 F.Supp. 130, 146-47 (S.D.N.Y. 1990). There is no conflict between the Second and Sixth Circuits concerning the interpretation and analysis of the second fair use factor.

CONCLUSION

For the foregoing reasons, Respondents HCF and Susan Axelrod urge the Court to deny NRA's petition for writ of certiorari.

Respectfully submitted,

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